

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE  
CONFERENCE OF THE NAACP, and

TAIWAN SCOTT, on behalf of himself and all  
other similarly situated persons,

Plaintiffs,

v.

THOMAS C. ALEXANDER, in his official  
capacity as President of the Senate; LUKE A.  
RANKIN, in his official capacity as Chairman of  
the Senate Judiciary Committee; JAMES H.  
LUCAS, in his official capacity as Speaker of the  
House of Representatives; CHRIS MURPHY, in  
his official capacity as Chairman of the House of  
Representatives Judiciary Committee;  
WALLACE H. JORDAN, in his official capacity  
as Chairman of the House of Representatives  
Elections Law Subcommittee; HOWARD  
KNAPP, in his official capacity as interim  
Executive Director of the South Carolina State  
Election Commission; JOHN WELLS, Chair,  
JOANNE DAY, CLIFFORD J. EDLER, LINDA  
MCCALL, and SCOTT MOSELEY, in their  
official capacities as members of the South  
Carolina Election Commission,

Defendants.

**Case No. 3-21-cv-03302-MBS-TJH-RMG**

**THREE-JUDGE PANEL**

**PLAINTIFFS' SUPPLEMENTAL  
BRIEFING IN RESPONSE TO HOUSE  
DEFENDANTS' AMENDED  
PRIVILEGE LOG**

## INTRODUCTION

Plaintiffs, the South Carolina State Conference of the National Association for the Advancement of Colored People (“SC NAACP”) and Mr. Taiwan Scott, submit this response, as directed by the Court’s April 8, 2022 Text Order (ECF 217), to House Defendants’ Second Amended Privilege log that was served on Plaintiffs on April 1, 2022.<sup>1</sup> Plaintiffs attached their challenges to House Defendants’ amended privilege log. *See* **Exhibit A**.

While the revised privilege log has narrowed the contested issues because House Defendants no longer assert privilege as to 39 documents, it is apparent that House Defendants have not sustained their burden to show that the remaining 55 documents and communications are privileged. In particular, House Defendants still inappropriately assert privilege where the elements needed to establish attorney-client or work product privilege are not met. Plaintiffs respectfully ask the Court to conduct an *in camera* review of the remaining 55 entries in House Defendants’ amended privilege log to determine if documents and communications are properly being withheld on the basis of the attorney client or attorney work product privileges.

## ARGUMENT

House Defendants still fail to meet their burden to show they are entitled either the attorney client or work product privileges.<sup>2</sup> They have failed to provide additional information and detail to substantiate that they continue to withhold the remaining documents on a legitimate basis.

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<sup>1</sup> House Defendants served their initial privilege log on February 9, 2022. *See* ECF 145-1. After the Court ordered House Defendants to produce documents being withheld on the basis of the legislative privilege (ECF 153), House Defendants served an amended privilege log on March 13, 2022.

<sup>2</sup> With regard to the 39 documents where House Defendants no longer assert a privilege, Plaintiffs note that these materials have not yet been produced; upon production of these materials, Plaintiffs agree those documents will no longer be in dispute.

The changes House Defendants made to their privilege descriptions are largely cosmetic. For example, for Log No. 1, which is an email with two privileged attachments (Logs Nos. 2 and 3), the revised log reflects that House Defendants no longer assert work product but still withhold it on the basis of attorney-client privilege. House Defendants now refer to Ms. Emma Dean as “staff counsel” instead of “attorney” and Rep. Collins as a legislator “client.” The description now says that Ms. Dean is “forwarding” (not “conveying”) “legal advice and attorney work product in advance of redistricting hearing.” The previous log only referenced unspecified “public hearings.”

Log No. 1 is representative of the insignificant changes made to the remaining descriptions in the privilege log. Swapping “staff counsel” for “attorney” and adding the word “client” after “legislator” are not magic words that would establish an attorney-client relationship between lawyers employed by the Legislature (such as Ms. Dean and Mr. Patrick Dennis) and the members of the legislature. Similar changes were made to Log entries Nos. 1-10, 19, 28, 37-55. As Plaintiffs argued in their motion, House Defendants have not put forward any evidence establishing an attorney client relationship. *See* ECF 198 at 19-20. This lack of evidence is fatal to House Defendants’ privilege assertions. *See In re Grand Jury Subpoena*, 542 F. App’x 252, 254 (4th Cir. 2013) (listing elements of privilege); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (describing “classic test for application”).

Moreover, the changes to the privilege log do not demonstrate that counsel was providing, or being solicited for, legal advice.<sup>3</sup> For example, Log No. 45 is an email from Rep. Beth Bernstein

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<sup>3</sup> House Defendants continue to withhold documents that were created for the purpose of responding to “media inquiries” (Log Nos. 50-51) which are plainly not covered by the attorney client or attorney work product privileges. *See In re Signet Jewelers Ltd. Secs. Litig.*, 332 F.R.D. 131, 136 (S.D.N.Y. 2019) (finding communications between party and public relations firms not covered by privilege); *Lauth Group, Inc. v. Grasso*, No. 1:07-cv-0972-SEB-TAB, 2008 WL

to Ms. Dean, Reps. Henegan, Bamberg, Jordan, and Newton; and copying Mr. Roland Franklin, Ms. Linda Anderson, Reps. Collins, Hinson, and Elliot being withheld on the basis of the attorney client privilege. That document is described as a “[c]ommunication from legislator to staff counsel requesting legal counsel address questions related to redistricting.” Plaintiffs still do not know if the communication was for the purpose of soliciting legal advice or simply a request for information. In addition, Log No. 46, which Plaintiffs addressed in its opening brief, *see* ECF 198 at 20, still appears to be a communication soliciting *legislative* guidance rather than legal advice. The same is true for Log Nos. 1, 4, 7, 10, 19, 37, 39, 41, 43, 45-49, 55. Again, communications that are not for the purpose of soliciting, obtaining, or providing legal advice cannot be withheld and must be produced. *See Jones*, 696 F.2d at 1072.

Finally, House Defendants continue to withhold documents as “attorney work product” that were not made in anticipation of litigation but rather over the ordinary course of legislation.<sup>4</sup> For example, in Log Nos. 2, 5, 8, Ms. Dean appears to have drafted “talking points” for members of the Ad Hoc Redistricting Committee in advance of a November 9, 2021 redistricting hearing. Though these “taking points” contain “mental impressions, opinions, and legal advice for legislator

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926631, at \*4 (S.D. Ind. Apr. 4, 2008) (quoting *City of Springfield v. Rexnord Corp.*, 196 F.R.D. 7, 9 (D. Mass. 2000)) (“[D]ocuments prepared by the defendants’ attorneys ‘in anticipation of media inquiries’ were not protected by the attorney-client privilege.”).

<sup>4</sup> In Log Nos. 11-18, 20-27, and 29-36, House Defendants continue to withhold documents that appear to be analyses of maps submitted from members of the public, including the SC NAACP. The description for these documents are “[c]onfidential image of publicly submitted maps created by attorney with overlays to convey legal advice in preparation of litigation.” These were made not in anticipation for litigation because, as plaintiffs explained in its opening brief (ECF 198 at 22-23), (a) Ms. Dean never served as litigation counsel for the members of the Ad Hoc Redistricting Committee and (b) these documents would have been created irrespective of this lawsuit. Analyzing maps submitted by the public is a customary practice of the redistricting process and therefore they are byproducts of the legislative process.

clients,” they were not made in anticipation of litigation. The talking points were made in the ordinary course of legislation given that they were made *for a redistricting hearing*. The same observation also applies to Log Nos. 2-3, 5-6, 8-9, 11-18, 20-36, 38, 40, 42, 44, 47-54. As such, there is no basis to withhold these documents on the basis of the attorney work product privilege. *See Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 348 (E.D. Va. 2015).

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court conduct an *in camera* review of the remaining entries in House Defendants’ privilege log (Log Nos. 1-55) to determine whether documents and communications are properly being withheld from Plaintiffs on the basis of the attorney client communication privilege and the work product doctrine privilege.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 11, 2022, a true and correct copy of the foregoing was served on all counsel of record by electronic mail.

/s/ Christopher Bryant  
Christopher Bryant